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ALEXANDER L. STEVAS,
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No. 82-1481

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DEBORAH ANN ASTEMBORSKI,

Petitioner,

vs.

ROBERT SUSMARSKI,

Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I.

QUESTION PRESENTED

Whether the six year paternity statute of limitations violates equal protection guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, §26 of the Pennsylvania Constitution.

PARTIES

Contrary to Petitioner's statement in his Writ of Certiorari Petition, the caption of this case does not contain the names of all parties to the proceeding before the Supreme Court of Pennsylvania. In the Supreme Court of Pennsylvania, the County of Erie appeared in the court below.

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STATUTES CITED.

28 U.S.C. §1254(1) 1, 4
28 U.S.C. §1257(2) 1, 4, 5
42 Pa. C.S.A. §6704(e) 1, 3

RULES CITED.

U. S. Supreme Court Rule 19(.3). 5
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OPINION BELOW

The Opinion of the Pennsylvania Supreme Court, Western District for the case of Astemborski v. Susmarski is reported at 451 A. 2d 1012 (1982).

JURISDICTION

The Pennsylvania Supreme Court entered judgment in favor of the Respondent herein on November 4, 1982. Petition for Writ of Certiorari was filed on or about February 4, 1983 by Petitioner's Counsel. Jurisdiction of this Court is sought by Petitioner under 28 U.S.C. §1254(1) but was revised by an Amended Statement of Jurisdiction by Petitioner's Counsel invoking jurisdiction under 28 U.S.C. §1257(2) on or about March 7, 1983.

STATUTE INVOLVED

The Statute involved is 42 Pa. C.S.A. 6704(e):

> All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action maybe commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

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COUNTERSTATEMENT OF FACTS

On September 9, 1980, Deborah Ann Astemborski, Petitioner, filed an application for support with the Commonwealth's Department of Public Welfare, and, in so doing, assigned to the Commonwealth all rights concerning support of her child. Accordingly on December 30, 1980, she appeared at the intake office of the Erie County Domestic Relations Department and filled out a Complaint for Support which was dated and marked

filed December 30, 1980. This Complaint was taken to the Prothonotary in order to receive a civil number on January 29, 1981, fifteen days after the applicable six year statute of limitations had expired. The trial court held that the governing rule at the time required the Complaint to be filed with the Prothonotary, not with the Domestic Relations Department. For this reason, the trial court concluded that the Complaint was not timely filed, and the alleged father of Petitioner's child, Respondent Robert Susmarski, moved for dismissal of the Complaint. Dismissal was denied; however, as the trial court declared the statute of limitations a denial of equal protection.

A direct Appeal to the Pennsylvania Supreme Court was taken by Respondent herein on May 12, 1982, and subsequently argued by the parties on September 23, 1982. In an Opinion and Order filed November 4, 1982, the Pennsylvania Supreme Court overturned the Court of Common Pleas of the Six Judicial District of Pennsylvania and upheld the provisions of 42 Pa. C.S.A.

§6704(e) as being constitutional and not a denial of equal protection.

On or about February 4, 1983, a Petition for Writ of Certiorari from the final judgment of the Pennsylvania Supreme Court was filed in the United States Supreme Court by Petitioner invoking jurisdiction under the provisions of 28 U.S.C. §1254(1).

Subsequently on or about March 7, 1983, Petitioner's counsel attempted to amend his jurisdictional statement to 25 U.S.C. §1257(2).

ARGUMENT

1. The Petitioner incorrectly filed the Petition for Writ of Certiorari depriving this Court of Jurisdiction over the case.

Petitioner has failed to file any Notice of Appeal in the instant case to date and therefore a direct Appeal to the Court will not lie, and the Petition for Writ of Certiorari is plainly incorrect. In Petitioner's Writ of Certiorari, Petitioner's jurisdiction statement of 28 U.S.C. §1254(1) to this Court does not extend to an action of this nature where

final decision of state court has sustained validity of state statute challenged on federal constitutional grounds. In such instances the United States Supreme Court is required to take jurisdiction by Appeal, and not by way of Certiorari. Poulos v. New Hampshire, 345 U.S. 395 (1953) reh. den. 345 U.S. 5978 (1953). The decision herein of the Pennsylvania Supreme Court is reviewable, if at all, only by Appeal Jurisdiction under 28 U.S.C. §1257(2) and accordingly, the Writ of Certiorari should be denied.

2. The Petitioner failed to comply with the statute and rules of this Court thereby depriving the Court of jurisdiction over the case.

Pursuant to Supreme Court Rule 19(.3) Counsel for the Petitioner failed in his duty to notify Respondent on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such Notice was to have been served as require by Rule 28.

Pursuant to Supreme Court Rule 21(.1)(b),

Petitioner failed to name all parties to the proceeding in the Court below by failing to name and notify the County of Erie.

Pursuant to Supreme Court Rule 28(.4)(c) Petitioner failed to notify and serve the Attorney General of the State of Pennsylvania that the constitutionality of a statute of the State was drawn in question and its constitutionality challenged.

Accordingly, due to the above violations of the rules of the Supreme Court and Statutes, the Writ of Certiorari should be denied.

3. The decision of the Pennsylvania Supreme Court is obviously correct because it involves no conflict of opinion or other reason for review by this Court.

Contrary to Petitioner's views, there is no conflict between the decision of the Pennsylvania Supreme Court and Mills v. Habluetzel, — U.S.—, 102 S. Ct. 1549 (1982).

The Supreme Court of Pennsylvania followed the mandates of this Court in Mills. According to Mills:

> The fact that [the State] must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity.
>
> . . . The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims. Mills at pp. 1553-1555.

The Supreme Court of Pennsylvania stated that "Although the statute of limitations in question, as applied, results in there being greater impediments to the obtainment of support for an illegitimate child then for one born in wedlock, the support opportunity still accorded the former is not so truncated as to be, as termed by the Court in Mills, merely 'illusory.' Allowance of a six year period in which to institute a paternity claim does not so restrict support rights as to effectively extinguish

them." Astemborski v. Susmarski, 451 A.2d 1012, 1013-1014 (1982).

Moreover, The Supreme Court of Pennsylvania stated the following:

> We do not address the wisdom of the legislative scheme, but only its constitutionality. Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit. Astemborski at p. 1015.

There is no reason to anticipate that the Court, if directly confronted with the issue, would disagree with the Pennsylvania Supreme Court's application of the Mills case to the instant case since it is in compliance with this Court's directives. The Court's decision is obviously correct and involves no conflict of opinion or other basis for review by this Court, and, therefore, no reason is apparent for review of the decision below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner, Deborah Ann Astemborski, should be denied.

Respectfully submitted,

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